

NTSB Order No.
EM-133

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington D. C.
on the 7th day of May, 1986

JAMES S GRACEY, COMMANDANT, UNITED STATES COAST GUARD,

v.

PERRY STEPHEN MANN, Appellant.

Docket ME-107

ORDER DENYING RECONSIDERATION

By Order EM-123, served November 7, 1985, the Board reversed a decision of the Vice Commandant affirming a three month suspension of appellant's merchant mariner's license for his operation of an uninspected passenger-carrying vessel in alleged violation of 46 U.S.C. 390c(a). The Board concluded, among other things, that assuming, arguendo, that the two voyages on which he served as master were not bona fide "bareboat" or demise charters in that the contracting parties may not have intended to effectuate a complete transfer of control over the vessel, appellant's license should not be subject to a remedial sanction where the Coast Guard had failed to establish that appellant, who was not an employee of the vessel owner and was not privy to the contract negotiations between the vessel owner and the charterer, knew or should have known "that the parties might have envisioned some relationship not described by the charter agreements", in circumstances where the conduct of the charters was consistent with the terms of those agreements. Order EM-123 at 5. The Coast Guard has filed a petition requesting that the Board reconsider Order EM-123 and affirm the Vice Commandant's decision.¹ For the reasons that follow we decline to do so.

The Coast Guard contends, first, that it has no obligation to establish a seaman's actual or constructive knowledge of the operative facts of a violation of law in order to prove a charge of misconduct. We think this contention reflects a misunderstanding of our decision in this proceeding. We did not hold, and we do not

¹The appellant has filed a reply opposing the reconsideration request.

believe, that the Coast Guard must establish in all cases an intent to violate a specific law in order to prevail on a charge of misconduct. However, where, as here, the Coast Guard alleges in its specification a "knowing" violation of a statute, it has obligated itself to show more than just the facts that demonstrate the noncompliance; it must also show that the charged party knew or should have known of the noncompliance and proceeded nevertheless. In other words, the Coast Guard had to prove that appellant's behavior, in the opinion of any "reasonable person," failed "to conform to the standard of conduct which is required in the light of all the existing facts and circumstances."² In our judgement, the Coast Guard had not met that burden of proof in this proceeding since it did not show that appellant was aware or should have been aware that the intent of the vessel owner and the charterer concerning control of the vessel during the charter was not as stated in the bareboat charter agreements that appellant had played no role in negotiating.³ While it may be, as dissent to Board's decision expressed, that the appellant "could have easily ascertained the actual intent of the parties with respect to the control and management of the vessel during the charters," we are directed to no maritime custom, rule, or practice that would support the view that appellant breached a standard of conduct by his failure to look behind the terms of the charter agreements. We therefore adhere to our view that the Coast Guard did not prove its specification of a knowing and intentional violation of the inspection law.⁴

²See 46 CFR §5.05-20(a), defining the charge of misconduct.

³Although the Coast Guard reiterates on reconsideration the factors it believes compel a conclusion that valid bareboat charters had not been created, urging that they reveal the vessel owner's intent and charterer's ignorance of the legal effect of the provisions of the charter agreements transferring responsibility for the vessel to it during the charters, we remain unpersuaded, for the reasons given in our original decision, that those factors invalidate appellant's reliance on the parties' written expression of their intentions as set forth in charter agreements.

⁴Our conclusion in this respect is not altered by the circumstance, noted in our original decision, EM-123 at 7, n. 12, that appellant knew of the vessel owner's ongoing discussions with the Coast Guard "on whether the charter agreements the owner was using placed the vessel beyond the reach of the inspection statute and that the Coast Guard ...had expressed the view that they did not." Since the appellant could reasonably believe that the applicability of the inspection requirement was dependent on

The Coast Guard next contends, for the first time in this proceeding, that a certificate of inspection was required for these charters whether of not valid bareboat charters had been created because none of the persons on board the voyages fall within any of the exceptions to the statutory definitions of a passenger.⁵ We intimate no view on the merits of the Coast Guard's belated interpretation of the scope of the inspection requirement.⁶ However, while the Coast Guard is free to advance that interpretation in any future case it may prosecute, it is too late to change the law of the case as litigated in the proceeding before us, namely, that "if [the charterer] was a demise or bareboat charterer of the vessel, then the participants on board were guests of [the charterer] and not 'passengers' within the meaning of 46 U.S.C. 390" (EM-123, at 3). We will not entertain on reconsideration new arguments that cannot be reconciled with a party's prior position on the appeal.

ACCORDINGLY, IT IS ORDERED THAT:

The request for reconsideration is denied.

GOLDMAN, Vice Chairman, LAUBER and NALL, Members of the Board, concurred in the above order. BURNETT, Chairman, filed a dissent.

the validity of the charter agreement as a demise of the vessel, he could fairly assume that his operation of the vessel pursuant to and in accordance with the agreement was lawful pending a dispositive resolution of that issue between the vessel owner and the Coast Guard.

⁵See Order EM-123 at 2, n.2 for the definition of passenger set forth in former section 390(a), 46 U.S.C.

⁶The Coast Guard acknowledges that it did not previously take this position on appellant's appeal.

BURNETT, Chairman, dissenting:

For the reasons stated in my dissent from the majority's original decision on the merits of appellant's appeal, I continue to believe that the appellant should be held accountable for his operation of an uninspected vessel on the two dates in this issue. I would grant Coast Guard's request for reconsideration.

Jim Burnett
Chairman